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No.87-1611

In The

# Supreme Court of the United States

October Term, 1987

THE CITY OF HOUSTON, ET AL.,

*Petitioners,*

v.

MOSES LEROY, ET AL.,

*Respondents.*

**ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT**

## RESPONDENTS' BRIEF IN OPPOSITION

George J. Korbel
220 Gardenview
San Antonio, Texas 78213

Jesse Roy Botello
515 South Main
San Antonio, Texas 78204
(512) 225-5346

L.A. "Al" Greene Jr.
535 Marathon Oil Tower
5555 San Felipe
Houston, Texas 77056
(713) 529-7700

*Attorneys for Respondents*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
or call collect (402) 342-2831

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## QUESTIONS PRESENTED FOR REVIEW

1. Did the U.S. Court of Appeals for the Fifth Circuit properly apply the clearly erroneous standard in the review of the findings of fact by the district court that the Plaintiffs' litigation was a significant catalyst which caused the City to abandon at-large elections.

2. Did the U.S. Court of Appeals for the Fifth Circuit properly apply the clearly erroneous standard in the review of the award of fees for Plaintiffs' litigation where, as the district court found, the Department of Justice intervened at the eleventh hour and added nothing to the Plaintiffs' case.

3. Did the 13% reduction in the fee award by the Court of Appeals correct the minor problems in the Plaintiffs' record keeping.

## LIST OF THE PARTIES TO THE PROCEEDINGS

Defendants:

| | |
|---|---|
| The City of Houston, Texas | |
| Members of the Houston City Council: | |
| Frank Mann | Houston, Texas |
| Johnny Goyen | Houston, Texas |
| Judson Robinson, Jr. | Houston, Texas |
| Larry McKaskle | Houston, Texas |
| Louis Macey | Houston, Texas |
| Homer Ford | Houston, Texas |
| Frank Mancuso | Houston, Texas |
| James Westmoreland | Houston, Texas |
| Jim McConn | Houston, Texas |

Plaintiffs:

| | |
|---|---|
| Moses Leroy | Houston, Texas |
| Mickey Leland | Houston, Texas |
| Lawrence L. Pope | Houston, Texas |
| Joe Perez | Houston, Texas |
| Joe Padilla | Houston, Texas |
| Hector Garcia | Houston, Texas |
| Don Horn | Houston, Texas |
| Harris County Council or Organizations | Houston, Texas |
| Harris County Women's Political Caucus | Houston, Texas |
| Political Association of Spanish Speaking Organizations | Houston, Texas |
| Greater Houston Civic Houston | |
| Ben T. Reyes | Houston, Texas |
| H. L. Garner | Houston, Texas |
| J. L. Marshall | Houston, Texas |
| Anthony Hall | Houston, Texas |
| Tom Rodriguez | Houston, Texas |
| Tom Bass | Houston, Texas |
| Herman Lauhoff | Houston, Texas |

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|---|---|
| Bebe Bruce | Houston, Texas |
| Mike Noblet | Houston, Texas |
| Joe Pentony | Houston, Texas |
| Don Horn | Houston, Texas |
| John W. Taylor, Jr. | Houston, Texas |
| John Hughey | Houston, Texas |
| Neil West | Houston, Texas |
| Jim Dunne | Houston, Texas |

A Class Composed of all Black Residents of the City of Houston

A Class Composed of all Mexican American Residents of the City of Houston, Texas

Counsel for the Plaintiffs:

| | |
|---|---|
| George J. Korbel | San Antonio, Texas |
| Jesse Botello | San Antonio, Texas |
| L.A. "Al." Greene | Houston, Texas |
| Law Office of Frumencio Reyes Juan Aldape | Houston, Texas |
| Law Office of Craig Washington | Houston, Texas |
| Sidney Bracquet | Houston, Texas |
| David Boddie | Houston, Texas |
| Regina Temple | Houston, Texas |
| Larry Evans | Houston, Texas |
| Hogan & Hartson | Washington, D.C. |

Attorneys of Record for the Respondents

Counsel for the City of Houston:

Jerry E. Smith
City Attorney — Houston, Texas
Robert J. Collins
Senior Asst.
City Attorney — Houston, Texas
John E. Fischer
Senior Asst.
City Attorney — Houston, Texas

Attorneys of Record for the Petitioners

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## ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

## RESPONDENTS' BRIEF IN OPPOSITION

The Respondents, Moses Leroy et al. respectfully request that this Court deny the petition for writ of certiorari seeking review of the Fifth Circuit's opinion in this case. That is reported at 831 F. 2d 576. The opinion of the district court is reported at 648 F.Supp. 537. Both are reprinted in the Appendix to Petition for Certiorari.

## OTHER REFERENCES

The parties will be referred to as "Plaintiffs" and "the City." Plaintiffs are the persons who brought suit to force the City of Houston to adopt single member dis-

tricts and now have been granted an award of attorneys' fees. The Petitioner for Certiorari, defendant before the district court, is the City of Houston. It will be referred to as "the City" or as "Houston."

References to the opinions below will be to the published versions with cross reference to the Appendix to the Certiorari Petition. Reference to the "Transcript of Proceedings" of the eleven day hearing on attorneys' fees will be cited as "Tr." with the Volume as Roman Numeral and the page number as an Arabic Number. Plaintiffs' exhibits are referred to as "Px" and Defendants' exhibits as "Dx" with the exhibit number.

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## STATEMENT OF JURISDICTION

### This Court Lacks Jurisdiction Because the Petition For Certiorari was not Timely Filed

Rule 20.4 of the Supreme Court provides as follows:

> .4 The time for filing a petition for writ of certiorari runs from the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate (or its equivalent under local practice). However, if a petition for rehearing is timely filed by any party in the case, the time for filing the petition for writ of certiorari for all parties (whether or not they requested rehearing) runs from the date of the denial of rehearing or of the entry of a subsequent judgment entered on rehearing.

The opinion of the Court of Appeals for the Fifth Circuit was rendered on November 12, 1987. Thereafter, on November 23, the City requested and was granted an

extension of time to December 10, 1987 for filing a Petition for Rehearing. Under Fifth Circuit Local Rule 27.16, this request was granted by the clerk. On December 10, 1987, the City filed a Suggestion for Rehearing En Banc but did *not* file a Petition for Rehearing. Thereafter, Houston did not request that this Court grant an extension of time in which to file a Petition for Certiorari.

Since the City filed no Petition for Rehearing, Rule 20.4 in conjunction with 28 U.S.C. Sec. 2101(c) requires that a Petition for Certiorari be filed within 90 days after "the date the judgment or decree sought to be reviewed is rendered, and not from the date of the issuance of the mandate." In this situation the docket sheet of the Court of Appeals indicates that the opinion of the Fifth Circuit was filed on November 12, 1987. Counting 90 days from that date, the time expired on February 11, 1988. Here, it is clear from the affidavit of counsel that service by mail of the petition for certiorari was not attempted until March 28, 1988. The petition is out of time and "must . . . be denied for want of jurisdiction." *Department of Banking v. Pink*, 317 U.S. 264, 268 (1942); *Matton Steamboat Co. v. Murphy*, 319 U.S. 412 (1943).

A Petition for Rehearing and a Suggestion for Rehearing En Banc are not the same and are covered by two separate appellate rules (FRAP 35 for Rehearing En Banc and FRAP 40 for Rehearing). Indeed, Local Rule 35.2 of the Fifth Circuit specifically prohibits the filing of a Request for Rehearing and a Suggestion for Rehearing En Banc in the same document:

> Local Rule 35.2 Form of Suggestion. The suggestion shall not be incorporated in the petition for rehearing

before the panel, if one is filed, but shall be complete in itself.

Stern and Gressman's treatise on Supreme Court practice specifically deals with the question of whether filing only a Suggestion for Rehearing En Banc will stay the running of the time for filing of a petition for certiorari and concludes:

> *A "Suggestion," authorized by Rule 35 of the Federal Rules of Appellate Procedure, that the Court of Appeals rehear the panel's decision en banc does not have the effect of a petition for rehearing, and thus by itself does not extend the time to petition for review by the Supreme Court.* Rule 35(c) states that "the pendency of such a suggestion . . . shall not affect the finality of the judgment of the court of appeals." [Emphasis added]

R. Stern, E. Gressman & S. Shapiro, Supreme Court Practice Sec. 6.3 at 313 (6th Ed. 1986).

In civil cases, which are governed by 28 U.S.C. Sec. 2101(c), the time limit of 90 days has been treated by this Court as jurisdictional and "no waivers are recognized . . ." R. Stern, E. Gressman and S. Shapiro, Supreme Court Practice Sec. 601 (d) at 306 (6th Ed. 1986); see also *Deal v. Cincinnati Bd. of Ed.*, 402 U.S. 962 (1971) (Mr. Justice Douglas, dissenting) and *Teague v. Commissioner of Customs*, 394 U.S. 977 (1969) (Mr. Justice Black dissenting).

We would expect that Houston will argue that the Order of the Fifth Circuit on the City's Suggestion for Rehearing En Banc which was denied on December 22, 1987 but not filed by the clerk until December 28 had the same effect as if the City had filed a "Petition for Re-

hearing" because in the form denial Order of the Fifth Circuit reads:

> (X) Treating the suggestion for rehearing en banc as a petition for panel rehearing, it is ordered that the petition for panel rehearing is DENIED. No member of the panel nor Judge in the active regular service of this Court having requested that the Court be polled on rehearing en banc (Federal Rules of Appellate procedure and Local Rule 35), the suggestion for Rehearing En Banc is DENIED.

A copy of the Order of the Fifth Circuit "On Suggestion for Rehearing En Banc" is found in Petitioners' Appendix D at 123a.

The Rules of this Court and 2101(c) clearly limit the stay of the running of the certiorari period to situations in which a party has filed a petition for rehearing. Here, there was no Petition for Rehearing filed by either party. Rather, the Court of Appeals, after the expiration of the period in which a petition for rehearing could be filed, made use of a form order stating that it was treating a "Suggestion for Rehearing En Banc" as a "petition for panel rehearing." The statute and rules specifically require that a party file a Petition for Rehearing to stay the running of the 90 day period. This time period has been strictly construed by the Court. *Deal v. Cincinnati Bd. of Ed.*, 402 U.S. 962 (1971) (Mr. Justice Douglas, dissenting). Here no party filed a Petition for Rehearing. Therefore, it should be irrelevant how the Fifth Circuit treated the City's Suggestion For Rehearing En Banc.

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## STATEMENT OF FACTS

### 1. Overview

This matter involves an award of attorneys' fees to Plaintiffs who brought three actions against the City of Houston in which they sought to have the at-large council election system changed into single-member districts. Although Mexican Americans and Blacks accounted for nearly 40% of the city population, only one Black and no Mexican Americans had ever been elected to the city council. As the district court found, Plaintiffs tried virtually every avenue to change the system short of litigation. (648 F. Supp. 548-549, App. A 24a-26a).

In 1966, a charter revision commission recommended the adoption of single-member districts. (*Mann* Tr. Vols. I at 1-71; XI at 28-32; XVII at 170). The Houston city council took no action upon this recommendation. (*id*). In 1973 and 1975, minority state representatives, including two who were named Plaintiffs, introduced bills to compel single-member district elections in Houston. (648 F. Supp. 548-549, App. A 24a). Although similar legislation led to the adoption of single-member districts for the Houston I.S.D., the City used its lobbyists and influence to defeat these bills. (*id*). In 1975, just prior to the trial on the merits of the *Mann* single-member district case, a "straw vote" was held in which the question of single-member districts was presented to the people of Houston. Fifty-six percent of the voters favored single-member districts. As with the recommendations of the charter revision commission, the Houston city council took no action. (648 F. Supp. 548, App. A 24a).

In 1973, this Court affirmed the holding that at-large state representative districts in Dallas and San Antonio were illegal because such systems made it more difficult for minority voters "to participate in the political process and to elect representatives of their choice". *White v. Regester*, 412 U.S. 755, 766 (1973). Shortly thereafter, the Plaintiffs filed *Greater Houston Civic Council v. Mann*, No. H-73-1650 (S.D. Tex.) (*Mann*) as a Constitutional and statutory attack on the at-large City Council elections in the City of Houston.

In 1975, while Plaintiffs were awaiting a trial setting in *Mann*, the preclearance provision of the Voting Rights Act of 1965 (as amended in 1975) 42 U.S.C. Sec. 1973(c) was extended to cover Texas. Although the Act had been effective in August of 1975, the City took no steps to comply with its duty to preclear annexations before the beginning of the election process for the November 1975 City Council elections. Accordingly, the named Plaintiffs in *Mann* filed suit to force compliance and again demanded that the City adopt single-member districts. *Leroy v. City of Houston*, No. H-75-1731 (S.D. Tex. Oct. 1975) (*Leroy I*). After Plaintiffs filed suit, but prior to the actual receipt of service, the City began the process of submission. The three-judge court convened, refused to enjoin the election but indicated that if the Department of Justice entered an objection, new elections would be ordered. Thereafter, no objection was entered. Plaintiffs sought fees for this case in 1976 and were denied by the three-judge court on the ground that the ultimate goal of the plaintiffs was single-member districts and since that had not resulted, Plaintiffs did not prevail. (Dx 4). Plaintiffs took no appeal from this Order.

*Mann* came to trial in the later part of 1976. Testimony continued for five and one-half weeks. The City spent more than $250,000.00 on outside experts and an additional half million dollars in staff time preparing for and trying the case. (648 F. Supp. 570, App. A 75a). The district court found against the Plaintiffs in 1977. *GHCC v. Mann*, 440 F. Supp. 696 (S.D. Tex. 1977). The Plaintiffs appealed to the Fifth Circuit and were joined in an Amicus Brief filed by the Department of Justice urging that the district court's opinion be vacated because of improper and incomplete applications of the standards set down in *White v. Regester*, 412 U.S. 755 (1973) and *Zimmer v. McKeithen*, 485 F. 2d 1297 (5th Cir. 1973), aff'd *sub nom. East Carrol Parish v. Marshall*, 424 U.S. 636 (1976).

In considering the Plaintiffs' request for fees, the district court reviewed the 1977 opinion in *Mann;* the relevant Fifth Circuit precedent at the time; listened to the testimony of the witnesses and examined the documents offered as exhibits. The court found that the City was not only expecting a remand of the *Mann* case but had taken various steps, including spending $63,000.00 to hire expert witnesses to prepare for an expected retrial. (648 F. Supp. 549, App. A 26a-27a). This finding was affirmed by the Court of Appeals. *Leroy v. City of Houston,* 831 F. 2d 576, 583, App. C 113a.

In 1977 and 1978, while the appellate briefing was going on in *Mann,* the City made a series of additional annexations, failed to submit them for preclearance and then proceeded to set a special election. The Plaintiffs filed under Section 5 of the Voting Rights Act to enjoin the election unless and until the annexations were precleared.

*Leroy v. City of Houston,* H-78-2174 (*Leroy II*). Two months after Plaintiffs initially brought this matter before the district court, the Department of Justice filed a separate suit and moved to consolidate its suit with *Leroy II*. The motion was granted and the cases were consolidated under the *Leroy II* style and docket number. On the morning of the hearing on the Plaintiffs' request for a preliminary injunction in *Leroy II*, the Houston City Council held a special meeting and passed a resolution "postponing" the election. (648 F. Supp. 533, App. A 35a; see also Dx. 11). At the Preliminary Injunction hearing held that afternoon, the City provided the three-judge district court with a copy of the resolution postponing the election. The City assured the three-judge court that the submission of the annexations would be attended to and that no elections would be held until there was compliance with the preclearance provisions of the Voting Rights Act.

Accordingly, the three-judge district court found that it was unnecessary to enjoin the election since the city had cancelled it. (648 F. Supp. 553, App. A 35a). Some months later, the Department of Justice entered a Voting Rights Objection to the annexations. In spite of the objection, the City set yet another election. (648 F. Supp. 553, App. A 35a). Plaintiffs requested and were granted an injunction against the holding of this election. (*id*). At this point the City threw in the towel and concluded the ongoing negotiations with the Plaintiffs on a plan of apportionment. (648 F. Supp. 562, App. A 55a-56a). The district court found that "the City made concessions to the plaintiffs regarding the drawing of lines for the various districts" and agreed to include "an escalator clause" which results in a growth in the number of dis-

tricts as Houston continues its population expansion. (*id*). This negotiated plan of apportionment was then offered as a Charter Revision Referendum and was passed.

There was no doubt in anybody's mind at that time about the impact of the Plaintiffs. The counsel for the City informed the district court, this "referendum issue [was] the very relief which they [Plaintiffs] seek to obtain through constitutional and Voting Rights Act Litigation." (City's Motion to Dismiss at pages 2-4 filed Dec. 8, 1978, cited in docket entry 21 on *Leroy II* docket sheet). At the first election after the city changed to district elections, two of the named plaintiffs, including the first Mexican American and three Blacks were elected to the council.

Thereafter, the Fifth Circuit considered the appeal which had been pending in *Mann*. Since the remedy sought by the Plaintiffs had been obtained, that Court felt that the case was moot and remanded it for a consideration of attorneys' fees. (831 F. 2d 576, App. C 102a).

**The Fee Proceedings**

The attorneys' fees phase of this case began in 1982. The City attempted to sever the hearing on these interrelated cases (*Mann, Leroy I*, and *Leroy II*). This was denied. *Leroy v. City of Houston*, 584 F. Supp. 563 (S.D. Tex. 1984). No appeal was taken from this order. The district court set five final hearing dates and continued four of them on the City's Motions because the City had done no discovery and was not ready. On June 15, 1984 when the district court denied the fourth motion of the City to continue, the final hearing began as scheduled and

proceeded through the morning. Prior to the noon recess, the district judge urged the parties to try again to settle the case. The parties met, obtained authority and worked out what was announced to the court as a settlement. (Tr. June 18 at 2). It was agreed that the City would settle with the Plaintiffs for $550,000.00, $150,000.00 to be paid immediately with the balance due over a period of four years at the statutory interest rate. (*id.* LL 7-22).[1]

The parties informed the court, however, that formal approval for the settlement would have to be made by the Houston City Council in official session and that the Senior Assistant City Attorney, who had handled the cases from their inception more than ten years earlier would take care of that. (*id.* at 3). Counsel for the City assured the district court that while it was too late to get the settlement on the agenda for the following day that it would be taken care of as soon as possible and "would pass." (*id.* at 4).

On July 11, almost a month after the settlement was announced in open court and without carrying through on the agreement to present the settlement to the city council, the Houston City Attorney personally appeared for the first time in the case and filed a request for a Mandamus

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[1]Normally, settlement negotiations would not be a part of the record and would not be appropriate to mention in this brief. However, the City mentions the "aborted settlement" in its statement of the case. Petition for Certiorari at 8. In addition, the "settlement" was announced in open court and a copy of the letter from the City Attorney of Houston reneging on the settlement was sent to the district court. At the hearing on fees, the Plaintiffs offered testimony on the settlement and here was no objection from the City. The district court also mentions the problem of the "settlement" in the opinion. See generally 648 F. Supp. 568, App. A 70a.

with the Fifth Circuit seeking to have the district judge recused.

After filing the Mandamus, the city attorney sent a letter to counsel for the Plaintiffs with a copy to the district court refusing to comply with the settlement. This entire process of first agreeing to settle, attempting to mandamus the recusal of the Judge and then reneging on the settlement is referred to in the City's brief as "further skirmishes between the parties including an aborted settlement and an attempted recusal. . . ." Petition at 8. On October 10, 1984, the Fifth Circuit refused to grant the Mandamus. *In Re City of Houston*, 745 F. 2d 925 (5th Cir. 1984). Thereafter, the Senior Assistant Attorney, who had represented Houston from the day *Mann* was filed in 1973 through the day the settlement was announced in open court in 1984, moved and was allowed to withdraw as counsel.

With new lawyers at the helm of the defense, Houston again moved to continue and to reopen discovery. The motion was granted and the City proceeded with discovery including several days of depositions. The final hearing on the merits began on April 17, 1985. Ten days of testimony followed. The witnesses included the two persons who were the Mayors of Houston during the time the Plaintiffs' litigation was pending; several members of the Houston City Council (from that same period as well as current members) and the two City Attorneys who were advising the Mayor and City Council during that same period. At the fee hearing, in spite of the history of resisting the various efforts of the Plaintiffs to adopt districts, the former city officials testified that, in fact, they

had been supporters of district elections all along and "that the political process would have eventually created those districts anyway." (648 F. Supp. 548, App. A. 24a). However, the district court found such representations to be "spurious" and that "litigation . . . was strategically the only way to achieve the adoption of single-member districts in Houston." (648 F. Supp. 557, App. A. 44a-45a).

On August 1, 1985, the district court filed an opinion and final judgment which is reported at 648 F. Supp. 537 and included in the Appendix to the Petition for Certiorari as Appendix A. Thereafter the City appealed to the Court of Appeals for the Fifth Circuit which affirmed the finding that the Plaintiffs' litigation in *Mann* and *Leroy II* had been a catalyst leading to the adoption of district elections but reversed the findings of the district court in *Leroy I*. The Fifth Circuit disallowed a small number of hours for administrative work, cut out the .15% multiplier which had been granted by the district court and rejected the award by the district court for plaintiffs' expert witnesses. Finally, the total remaining fee award was reduced by 13% to account for the manner in which records were in the 1973-1978 period. The decision of the Fifth Circuit is reported in *Leroy v. City of Houston*, 831 F. 2d 576 (5th Cir. 1987) and included in the Appendix to the Petition for Certiorari as Appendix C.

**Reasons That The Petition For Certiorari Should Be Denied**

Together *Mann* and *Leroy II* put tremendous pressure on the City to abandon the at-large election system. "*Mann*, although lost at trial by plaintiffs, was widely expected to be reversed and remanded and would pose a

continuing threat of judicial intervention in the City's districting." *Leroy v. City of Houston,* 831 F. 2d 576, 581 (5th Cir. 1987), App. C 107a. While "the issue of substantive district revision was pending in the [appellate] courts, pretermitting further assertion of such a cause of action [,] *Leroy II* sought and achieved the goal of requiring the city to submit major annexations for Justice Department approval." (*id.*), App. C 107a-108a.

Plaintiffs were then able to have the district court enjoin any further city elections placing "the status of the annexations and any bond elections . . ." in limbo. (*id*). As a result, the Plaintiffs had the City's electoral and tax collecting processes in shambles. Without dealing directly with the adoption of single-member districts, there could be no resolution of such important considerations as the upcoming city council elections, the need for a bond election as well as the question of whether the City would provide services and collect taxes in the annexed areas. The record indicates that the City fought long and hard, expending vast amounts of money, to retain the at-large structure. It was no holds barred and the City called upon a virtually unlimited budget to defend against the Plaintiffs' litigation. But in the end the Plaintiffs cut off all avenues and the City was forced to negotiate with the Plaintiffs. Single-member district elections and increased minority participation resulted. The Fifth Circuit put it in a nutshell when it found "the plaintiffs were, in sum, the irresistible force pressing upon the City as immovable object." 831 F. 2d 576, 581 (5th Cir. 1987), App. C 108a.

**A. The City Has Offered No Suitable Reason For Granting Certiorari**

The general considerations for Supreme Court review by writ of certiorari, as set out in Rule 17.1, have not been satisfied in this case. There is no allegation that the opinion of the Fifth Circuit is in conflict with the decision of another federal court of appeals. There is no allegation that the Fifth Circuit has decided an issue of law which has not been settled by this Court. Nor is there any allegation that the Fifth Circuit opinion is in conflict with a previous opinion of this Court. Although the City did not discuss or even mention Rule 17.1, the petition seems to suggest that the Fifth Circuit opinion represents a sufficiently serious departure "from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's power of supervision."

The City has presented three questions upon which it argues that Certiorari ought to be granted. The first involves whether the district court was clearly erroneous in finding that the Plaintiffs were a "substantial factor or a significant catalyst" in "motivating" the change by the City from at-large to district elections. This "catalyst" finding of fact was approved by the Court of Appeals with the observation "[t]hat plaintiffs eventually obtained the objective of their litigation is not seriously disputed." *Leroy v. City of Houston,* 831 F. 2d 576, 579 (5th Cir. 1987), App. C 104a.

The second question deals with whether attorneys' fees should be denied to successful Plaintiffs in *Leroy II* where, as found by the district court before whom the case was tried, the "Plaintiffs performed all the essentials

in the litigation at bar and then were joined at the eleventh hour by the Department of Justice [matter omitted]. "Every indication is that the plaintiffs made their own case even after the Department of Justice arrived, and that the Department did not actively represent the Plaintiffs." (648 F. Supp. 537, 557-558, App. A 46a). The Court of Appeals affirmed the findings of the district court on this matter. (831 F. 2d 583, App. C 113a).

The third question posed for certiorari is whether the total amount the fee award found by the district court and reduced by the court of appeals ought to be further reduced.

**1. The Catalyst Question**

In sum total, the City quibbles with the extensive fact-finding of the district court. The test applied by the district court to decide the prevailing party question involved a determination of whether or not the Plaintiffs' litigation was a "substantial factor or a significant catalyst" involved in "motivating" Houston to abandon the at-large election system under question. *Hennigan v. Ouachita Parish School Bd.*, 749 F. 2d 1148, 1152 (5th Cir. 1985) citing *Hensley v. Eckerhart,* 461 U.S. 424, 433 ff. (1983). This is a clear question of fact upon which the district court had the opportunity to listen to not only the evidence of the Plaintiffs but also to the testimony of the persons who were the Mayors, council members and City Attorneys of Houston during the time the litigation and adoption of district council election.

In *Pullman Standard v. Swint,* 456 U.S. 273, 287-88 (1982), this Court made it clear that a question involving

intent is a "pure question of fact, subject to Rule 52(a)'s clearly-erroneous standard." See also *Dayton Board of Education v. Brinkman,* 443 U.S. 526, 534 (1979) (issue of intentional maintenance of a racially segregated school system a factual finding subject to the clearly erroneous rule). A fact-finding by the district court is not clearly erroneous "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it even though convinced that had it been sitting as the trier of fact it would have weighed the evidence differently. Where there are two permissible views of the evidence, the fact-finder's choice between them cannot be clearly erroneous [citations omitted]." *Anderson v. Bessemer City,* 470 U.S. 564, 573-574 (1985).

Where, as here, the findings of the district court are based in part upon determinations of the credibility of witnesses "Rule 52 demands even greater deference to the trial court's findings; for only the trial judge can be aware of the variations in demeanor and tone of voice that bear so heavily upon the listener's understanding of and belief in what is said. [citations omitted]." (*id.* at 575).

Although they would like this Court to think so, the Plaintiffs' part in the ultimate causation has never seriously been questioned by the City. The petition for certiorari suggests that this Court ignore the findings of the trial court because it is claimed that none of the evidence on "catalyst" passes an undefined standard of "competency." This is true, Houston argues, because none of the City officials testified that the Plaintiffs' litigation had an effect

on their decision to abandon the at-large election system. Petition for Certiorari at 11.

Even if competency was the standard by which this Court considers a certiorari petition, the representations of the City are simply not the state of the record before the district court. There was an abundance of testimony upon which the district court found causation. Yet, the City persists in its attempt at obfuscation by arguing that "it is hard to see how [Plaintiffs'] litigation could have any influence upon the City's adoption of single-member districts, and the Plaintiffs produced no evidence to establish such a nexus." Petition at 14. Contrary to the bald assertions of the City, many of their own witnesses conceded that the Plaintiffs and their litigation played a role in bringing about districts. Former Mayor Hofheinz, a City witness agreed on cross-examination "I think that the lawsuit played a role. . . ." (Tr. Vol. VIII at 130 LL. 9-16) and "There were many influences, certainly this lawsuit was one of them." (*id.* at 136 LL. 10-12).

Another City witness was Mr. Jim McConn, who was the mayor at the time that districts were adopted. He conceded "It [Plaintiffs' litigation] probably had some effect. . ." (Tr. Vol. IX at 197 L. 77) "how big a role I just couldn't begin to answer." (*id.* at 198 LL. 11-13). Timothy Cooper, Houston's expert witness on the fee question conceded that the Plaintiffs obtained the result that they sought and only quibbled about whether it was an "extra-ordinary result." (Tr. Vol. IX at 150 LL. 17 ff. and at 155 LL. 10-18).

The district court observed that Robert Collie, the city attorney at the time that the districts were adopted

"stated that he felt that the Plaintiffs would keep on filing lawsuits until the city adopted single-member districts. (Tr. Vol. X p. 108)." (648 F. Supp. 558, App. A 48a).

Current city councilman and plaintiff Ben Reyes testified that the lawsuits were "the key to success in the creation of single-member districts in the city of Houston. I think that it was the only reason that we were able to get single-member districts." (Tr. Vol. III at 95 LL 18 ff) One of Plaintiffs' expert witnesses was Charles Dipple who specializes in municipal law and is the senior partner in one of Houston's most respected law firms. He represented clients opposed to single-member districts in Houston and frequently consulted with Houston City officials at the time that the decision was made to adopt single-member districts. Mr. Dipple testified: "Based upon my following them and my perceptions of what happened, I don't think that there is any question that the series of litigation [*Mann, Leroy I* and *Leroy II*] had a very compelling effect upon the single-member districts as we know them today. . . ." (Tr. Vol. II at 49 LL. 1-5). Jose Garza, the Director of Voting litigation for the Mexican Legal Defense and Educational Fund, another of Plaintiffs' expert witnesses testified that from his review of the evidence that Plaintiffs were "the impetus, the catalysts for the change in the election structure." (Tr. June 18, 1984 hearing at 51 LL. 8 ff).

The Senior Assistant City Attorney agreed in open court to settle the case for $550,000.00. If he did not believe that the Plaintiffs played a significant role in this matter, certainly the Senior Assistant City Attorney who had been with these matters from the very beginning would

not have made the representations he did to the district court.

As their only other example of the weakness of the record, the City argues at page 12 of its petition that a $63,000.00 contract to hire an expert witness, was not, as found by the district court, to be in preparation for the expected remand of *Mann*, but rather involved a lawsuit which was completely unrelated to *Mann*. (648 F. Supp. at 549; App. A 26a-27a). At the more than two week hearing on the fees, the City offered no explanation for this expenditure to hire the firm of Hamilton & Rabinowitz other than the one advanced by the Plaintiffs. After the Plaintiffs offered the contract for expert testimony into evidence, the district judge stated "Well, I guess we will hear from the city." (Tr. Vol. VIII p. 23 LL. 6-1). No witness for the City attempted to explain why the $63,000.00 contract for expert fees was not related to the expected remand. Although Dr. Rabinowitz was listed as a witness for the City at the fee hearing in this matter, she was not called. The City did not mention this argument in either of the appellate briefs filed in the Fifth Circuit. For the first time in its rebuttal before the Fifth Circuit, the City claimed that this hiring of expert witnesses related to a suit styled *Marvin Delaney v. City of Houston* and not to *Mann*. Here, the district court listened to all of the evidence and had an opportunity to review the contract in question. Then, the district court made specific findings as to what the contract meant and that it was related to the expected remand of the *Mann* case.

This is not just an attempt to have this Court second guess the fact-finder, it is a bold shot at having this Court

become the fact-finder. There was plenty of opportunity to offer evidence about the contract with Dr. Rabinowitz. The person who was Mayor when the contract was entered into was on the stand as was the City Attorney who was in charge of hiring Dr. Rabinowitz. No questions were asked and no evidence was offered by the City on this point.

In fact, however, this is just an attempt to throw a red herring into the matter since *Delaney* was an inconsequential suit filed in 1977 which had nothing to do with the at-large/single-member district question. To argue that the $63,000.00 was spent on the *Delaney* case is again simply not the record. For example, an examination of the contract itself indicates that it specifically refers to "analysis [of] the electoral success achieved by members of minority groups [in Houston] . . . and under alternative [electoral] structures employed elsewhere in the nation." (Px 32).[2]

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[2]Nor is it even logical to conclude that this $63,000.00 would have been spent to prepare for the trial in *Delaney* because the contract was dated October of 1978 with performance dates spread out during 1979. (Px 32). After the City brought *Delaney* up in their oral argument to the Fifth Circuit, counsel for respondents checked the docket sheet in the *Delaney* case. There are no docket entries in the *Delaney* case after September of 1978 beyond ministerial docket sheet in the *Delaney* case. There are no docket entries in the *Delaney* case after September of 1978 beyond ministerial ones dealing with docket control. This is because the plaintiffs in *Delaney* abandoned their suit and filed a motion to intervene in *Leroy II*. Their Motion to intervene was subsequently denied. Thus, the contract with Hamilton and Rabinowitz was entered into in October of 1978 after the *Delaney* plaintiffs for all intents and purposes abandoned their litigation and later attempted to get into *Leroy II*.

**2. Leroy II**

The City argues that the intervention of the Department of Justice in *Leroy II* is a special circumstance which should result in the denial of the fees sought in *Leroy II*. In effect, the City argues that when the Government intervened at the "eleventh hour" (648 F. Supp. 558, App. A. p. 46a), the private Plaintiffs should have folded up their tents, gone home and let the Justice Department handle it. No court has ever found that the intervention of the Department of Justice in a suit brought by private parties should result in a denial of fees. To so hold would be a dangerous precedent because it would discourage the private enforcement of civil rights laws.

In any event, the district court had the special opportunity to not only hear the testimony of the witnesses in this case but to have been the managing judge of the three judge court which considered the *Leroy II* case. The district court found that the Plaintiffs did not just sit on their hands after the Department of Justice came into the *Leroy II* case. Rather Justice did nothing but duplicate the actions of the Plaintiffs (648 F. Supp. 557-558, App. 46a). The Government "merely intervened to add its voice on the side of the Plaintiffs [citation omitted]. "The plaintiffs did the substantive work." (648 F. Supp. 553, App. 35a).

**3. The Amount of the Fee**

The final argument made by the City is that the Fifth Circuit did not reduce the award of the district court enough. Basically, the Court of Appeals disallowed the modest .15% multiplier granted by the district court, cut out the award made for Plaintiffs' expert fees citing this

Courts' opinion in *Crawford Fitting v. J. T. Gibbons*, — U.S. —, 107 S. Ct. 2494 (1987), excluded the comparatively small number of hours spent by the Plaintiffs dealing directly with the Department of Justice and reversed the award for the time spent on *Leroy I*. In addition, the Circuit reduced the remaining award by 13% to take care of the City's complaints that the Plaintiffs did not keep adequate records.

The total effect of the action by the Court of Appeals was to reduce the Plaintiffs' fee award by almost $300,000.00 which represents just under 30% of the district court's award. The City grumbles that the reduction is not sufficient.

Houston deals with this argument by first claiming that the award to the Plaintiffs is nothing short of a windfall. Next the City claims that the way in which Plaintiffs maintained time records should have resulted in a reduction of more than that found appropriate by the Fifth Circuit. Finally Houston complains that the average per hour award of $157.00 is excessive. We will treat these three matters in reverse order.

**A. The Per Hour Amount Is Reasonable and Supported by the Record.**

The record before the district court included the testimony of the Plaintiffs' expert, Mr. Charles Dipple, the managing partner in Sears & Burns, a well respected Houston law firm which deals extensively with municipal law. Based upon his experience dealing with other lawyers; his knowledge of certain surveys which had been undertaken on fees charged by Houston law firms. (Tr. Vol. I at 135 L 10); and his experience in defending litigation such as this (*id.* at 126 LL 18 ff), he testified that in

Houston, the appropriate rate for experienced counsel in cases such as this would be $250.00 per hour (Tr. Vol. 1 at 136 L 2). He and the partners in his firm charge that rate for similar work. (Tr. Vol. II at 86 L 25 ff).

The Court also considered the survey published in 1984 (648 F. Supp. 537, App. 80a) which found that the rates for experienced attorneys in Houston ranged up to $250.00 per hour. National Law Journal's Directory of the Legal Professions New York Law Publishing Co. 1984. Mr. Robert Collie who was offered by Houston on other issues testified that the range of his fees was $170.00 to $225.00 per hour. (Tr. Vol. X at 92 LL. 6-13). See also *Wheeler v. Mental Health and Mental Retardation Authority*, 752 F. 2d 1063, 1073 (5th Cir. 1985) where it was conceded by counsel for the defendant that an appropriate fee rate in Houston would be $90.00 to $190.00 and *League of Latin American Citizens v. Seguin I.S.D.*, NO SA-83-CA-2222 (W.D. Tex. San Antonio Div. Sept. 4, 1987) at 4 where the court awarded Mr. Korbel $200.00 per hour. Here, the district judge awarded fees in the range of $60.00 to $200.00. The average fee for all lawyers worked out to $181.00 per hour.[3]

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[3]The district court found that lawyers in Houston with experience such as Mr. Greene, Mr. Korbel and Mr. Washington charge fee rates which range from $165.00 to $250.00 per hour (648 F. Supp. 537, 571, App. A. p. 77a n. 30) and then proceeded to find that an appropriate fee for these more experienced counsel was $200.00 per hour. (648 F. Supp. 571-574, App. A 77a-75a). Mr. Greene has been a lawyer for more than 20 years and was broad certified specialist at the time of the trial in *Mann*. Mr. Washington has been an attorney for more than 15 years and a member of the state legislature since 1971. Mr. Korbel

(Continued on following page)

Houston offered only one expert on the area of fees, Mr. Timothy Cooper, an associate in the Houston firm of Bracewell and Patterson. On direct examination he not only testified that the number of hours spent by the Plaintiffs was reasonable but also that an appropriate award for the more experienced attorneys in this case would be $150.00 per hour. (Tr. Vol. IX at 57-58). The effect of the 13% reduction made by the Fifth Circuit is an average of $157.00 per hour. Thus, the City appears, here, to be quibbling about $7.00 per hour. When the City's own expert concedes that the more experienced Plaintiffs' attorneys are worth $150.00 per hour, the

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has been involved in a large number of reapportionment and single member district cases. He has been an attorney for eighteen years and the City' expert admitted that Mr. Korbel is "highly competent" and well respected "litigator in the field of voting rights." (Tr. Vol. IX at 156, LL 24 ff) The district court also awarded the sum of $200.00 per hour to the members of the Washington D.C. law firm of Hogan and Hartson. Their fee petition indicates that they had experience ranging from more than four to over twenty years. The district court found that their work merited a fee equivalent to that found appropriate in Houston for experienced attorneys.

Although Mr. Botello had been admitted to practice for only one year at the time *Mann* came to trial, he had previously been employed by the Mexican American Legal Defense and Educational Fund. In that capacity, he had been responsible for preparation of expert witnesses and designed the proof plan utilized in *Graves v. Barnes,* 343 F. Supp. 704 aff'd in relevant part *sub nom. White v. Regester,* 412 U.S. 755 (1973). In addition, he is the author of a book on voting litigation. The district court found that his "skills in this area are unparalleled. . . ." 648 F. Supp. 573, App. A 82a. The court determined that an award of $150.00 per hour would be more appropriate because of the fact that he was less experienced than the other main counsel. (*Id.*) Other less experienced attorneys were awarded fees which ranged from $60.00 to $135.00 per hour.

cases cited in the long footnote on page 17 of the petition can be of little help.

**B. The Time Records Are Sufficient**

The City argues at 19 of its petition that Plaintiffs' total fee should be reduced more than 13% because "the woefully deficient time records submitted by Plaintiffs' attorneys in this case . . . results in an excessive fee." The purpose of requiring time records is to insure that the Plaintiffs are not awarded fees for excessive numbers of hours. By so arguing, the City attempts to impeach its own expert who testified on *direct examination* that the "overall" number of hours spent by the Plaintiffs was "reasonable." ("overall it does not look to be unreasonable in terms of hours." (Tr. Vol. IX at 67 LL 21-22; "yes, as I indicated the time was—I felt that the time was, generally, all right." *id.* at 154 LL 1-2.). This confirmed the testimony given by Plaintiffs' expert Jose Garza, Texas Regional Counsel for the Mexican American Legal Defense and Educational Fund (MALDEF) as well as that organization's Voting Rights Project Director. He stated that the number of hours claimed by the Plaintiff was "extremely reasonable for the complicated nature of these cases." (June 18, 1984 Tr. at 33 LL 7-10).

Nor is the time excessive on its face. Houston admits to having used 19 lawyers and almost 2,000 hours of attorneys time (on the merits of these cases alone) in addition to more than $255,000.00 in expert fees and $500,000.00 in city staff time (exclusive of city attorney time) in its defense of Plaintiffs' litigation. (648 F. Supp. 570, App. A 75a and Tr. Vol. VII at 56 LL 3 ff). In context, the $255,000.00 for experts was found by the

district court to be eighteen times more than the City has ever spent for experts in any other case. (648 F. Supp. 648 F. Supp. 567, App. A p. 68a).

Although the district court would have preferred the time records for the early years to have been in a different form, it found "that the records themselves adequately reflect the tasks for which the Plaintiffs' lawyers performed and the time those tasks took to perform. . . ." (648 F. Supp. 569, App. A 73a).

In fact, the Plaintiffs kept extensive time records. The record indicates that Mr. Green kept contemporaneous time records at all times. (Tr. Vol V at 68 LL 19 ff) Since 1981, these records have been maintained on his office computer. *(id.* at 70 LL 14-18) Prior to that time, the records were kept manually and have now been transferred to the computer. *(id.)* Mr. Botello and Mr. Korbel kept contemporaneous notations of time spent on notes in the files which counsel maintained in this case. (Tr. Vol. II at 157 LL 20-25; Vol. XII at 169 LL 8-14).[4] For time keeping after January 1, 1983, Mr. Korbel began keeping hourly contemporaneous computer time records which are maintained on computer disc storage. A printout of these records was made available to counsel for the city. (Tr. Vol. VII at 168 LL 21 ff). It is Mr.

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[4]In 1976, Botello and Korbel spent several weeks preparing to try the *Mann* case and kept records which documented tasks by the day. In other words, all things done in the day were accounted for but the records did not indicate the exact time in the day that the task was performed. Mr. Korbel testified that this was the same procedure which he had followed in time keeping for the fees affirmed by the Fifth Circuit in *Graves v. Barnes*, 700 F. 2d 220 (5th Cir. 1984). Tr. Vol. VII at 169 LL 18 ff.

Botello's practice to keep contemporaneous records on a legal pad which are then transferred to formal statements for client billing. (Tr. Vol. II at 157 LL 19 ff) . The records in this matter were available but the counsel for Houston never requested them. *(id.* at 189 LL 11 ff) Mr. Washington and his firm currently keep detailed contemporaneous time records on an office computer system and prior to that used a manual system of record keeping. (Tr. Vol. III at 64 LL 11). Only Mr. Reyes reconstructed his claim for fees by going through his notes from the trial, the appearances which he made, and conferences which he attended. (Tr. Vol. II at 129 LL 21 ff).

The records kept by the Plaintiffs clearly meet the standard set out by this Court in *Hensley v. Eckerhart,* 461 U.S. 424, 437 n. 12 (1984) "Plaintiff's counsel, of course, is not required to record in great detail how each minute of his time was expended. But at least counsel should identify the general subject matter of his time expenditures."

**D. This Is Anything But A Windfall**

The Plaintiffs have been involved with litigation against the City since 1973 in this matter. While the number of hours and the fee award is large, the tactics employed by the City were isolated by the district court as the cause of the problem. The district court found the actions of the City to have consistently "protracted . . . the resolution of this case" through the use of "stalling tactics." (648 F. Supp. 568, App. A 70). Houston "lacked openness and candor in discovery" (648 F. Supp. 567, App. A 68a); refused to cooperate in discovery (*id.*, App. A 68a-69a); "removed . . . official election re-

turns from the public records" forcing Plaintiffs to resort to seeking an opinion from the State Attorney General under the Texas Open Records Act (*id.*); "flout[ed] promise[s]" made in open court (*id.*, App. A 67a); forced Plaintiffs to resort to "protracted legal maneuvers" to try the cases (*id.*, App. A 68a); consistently delayed proceedings because they were unprepared and refused to comply with the terms of a settlement announced in open court. (648 F. Supp. 568, App. A 70a). Even the City's own expert on fees criticized the City for its tactics. (*id*). The overall conduct of the City was termed by the district court to be "deplorable" resulting in an increase the number of hours necessary to try the issues. (648 F. Supp. 568, App. A 69a).

The City chose to make even the fee proceedings, which began in 1982, into a second major litigation. There were extensive interrogatories, depositions, and motions to produce. When the City refused again to cooperate with discovery, Plaintiffs were forced to move for sanctions which were granted by the district court. As previously indicated, the City even filed a request for mandamus in the Fifth Circuit to remove the district judge. The City sought and received four continuances because it had failed to conduct discovery and was unprepared. These continuances were always sought at the very last moment requiring Plaintiffs to go through five full preparations. By continuing to seek continuances and extensions of time, delaying, and generally being non-cooperative, the City has been able to string out the fee proceedings for almost six years. While the City may opt to handle everything the hard way, it should not now be heard to complain that

its actions have substantially increased the amount of the award.

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## CONCLUSION

Houston failed to file its petition for writ of certiorari within the time specified by 28 U.S.C. § 2101(c). Accordingly the petition ought to be dismissed as untimely filed.

Even if the petition would have been timely filed, it ought to be denied. Houston now elects its representatives by district and the trial court made fact-findings that the Plaintiffs were a significant catalyst in the change from the at-large system. The Fifth Circuit affirmed this catalytic finding. This case presents no conflict between this Court and any of the Circuit Courts and no important federal issues which should be decided by this Court.

Respectfully submitted,

George J. Korbel
220 Gardenview
San Antonio, Texas 78213

Jesse Roy Botello
515 South Main
San Antonio, Texas 78204
(512) 225-5346

L.A. "Al" Greene Jr.
535 Marathon Oil Tower
5555 San Felipe
Houston, Texas 77056
(713) 529-7700

*Attorneys for Respondents*